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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 357

AMMIEL F. DECKER AND MABEL P. DECKER, INDIVIDUALS, TRADING AND DOING BUSINESS AS DECKER PRODUCTS COMPANY,
Petitioners,

vs.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARRY S. HALL,
Counsel for Petitioner.

J. C. TRIMBLE,
Of Counsel.

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vs.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

Petition

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on June 6, 1949 (R. 35). The judgment was based on a majority opinion (R. 25-28). There was a dissenting opinion by the Chief Judge (R. 28-34). The majority opinion affirming an order of the respondent, Federal Trade Commission, directing petitioners to cease and desist in advertising the utility of their patented invention, trade-marked Vacudex, as

described in their patent granted them by the United States Patent Office (R. 28, 10a-10d).

Statement

The facts appearing in the pleadings and record in the Circuit Court of Appeals are briefly these:

Ammiel F. Decker, one of the petitioners, invented an exhaust device for internal combustion engines (Patent, R. 10a). To protect his invention, on April 3, 1941, he made application for a patent (Patent, R. 10a). On January 12, 1943, a patent was granted, numbered 2,308,059 (Patent, R. 10a).

The patent is entitled "Exhaust Device For Internal Combustion Engines." The invention relates to exhaust connections for internal combustion engines that provides means for conditioning the exhaust gases from the engine (Patent, R. 10a-10d).

Substantially, the invention in one form consists of a large main tube, extending into which are a plurality of smaller cone shaped tubes, the larger end of the cone shaped tubes is extended in the direction of the travel of the vehicle so as to force cool streams of air in a curling, spiral motion into the exhaust system of an engine, creating a vacuum suction in the exhaust pipe and system. The revolving wheels of the vehicle press air backwards which enter the cones of the Vacudex with great force (Patent, R. 10a-10c).

The utility of the invention is described in the patent as follows:

To eliminate the danger of inhaling carbon monoxide gas; to reduce the back pressure of the engine; to reduce gasoline consumption; to increase the power of the motor; to cool the exhaust connections, reducing the temperature of the exhaust gases; to reduce the condensation of the exhaust gases in the exhaust pipe and muffler, lessening the

rusting of the parts (Objects, specifications of patent, R. 10b, 10c).

The invention may be applied to a new or old vehicle, or in stationary installations.

The invention is attached to the standard exhaust pipe of any standard make of an automotive vehicle by suitable clamps or attachments (Object, specifications of patent, R. 10b, 10c).

Soon after filing application for the patent, on April 3, 1941, petitioners commenced to practice, use and vend the invention, and in so doing advertised its utility as described in the patent. The advertising was in newspapers, magazines, circulars and over the radio (Complaint, answer, patent, R. 1-3, 5-10).

While the petitioners were advertising and vending their patented invention, and on December 11, 1943, the respondent Federal Trade Commission issued its complaint against them, alleging that petitioners' advertising of the utility of their patented invention was false, that it would not perform as advertised, that it would not reduce back pressure on the engine; would not save gasoline; would not increase the power of the motor; would not draw carbon, oil or moisture from the muffler; and would not to any extent eliminate carbon monoxide gas or the offensive odors of the exhaust gases (Complaint, Order to cease and desist, R. 1-3, 18, 19).

Petitioners made defense to the complaint by answer, pleaded their patent and exhibited it thereto, alleging that because of the involvement of their patent and patent rights, the respondent Federal Trade Commission lacked jurisdiction and that the provisions of the Federal Trade Commission Act did not apply to the advertising of the utility of the patent as described therein, and that in effect the complaint challenged the utility and thus the validity of the patent and that the respondent Commission lacked power and juris-

diction to consider and decide such an issue, and that the complaint and proceedings violated petitioners' Constitutional rights, the patent statutes, and in effect deprived petitioners of their property without just compensation in violation of Amendment V to the Constitution (Answer, patent, R. 5-10, 10a-10b).

Based on the complaint, answer and patent exhibited, petitioners made motion to respondent Commission to dismiss the complaint and proceedings upon the ground that petitioners by their advertising of the utility of their invention as described in the patent were not violating the Federal Trade Commission Act, and that they were within their Constitutional and statutory rights in so doing, and because of the involvement of their patented invention the Federal Trade Commission Act did not apply to the advertising, that the respondent Commission lacked power and jurisdiction to thus interfere in the advertising of the utility of their invention, that in effect, the complaint and proceedings challenged the utility and thus the validity of their patent, and that the respondent Commission lacked jurisdiction to consider and decide such an issue (Motion, R. 11, 12).

The respondent Commission denied the motion to dismiss without prejudice to renew it on final hearing (Order, R. 12).

On final hearing the motion to dismiss the complaint and proceedings was renewed and denied, and the respondent Commission decided on the record that the advertising of the utility of the invention as described in the patent and complained of was false and misleading as provided in the provisions of the Federal Trade Commission Act, and entered a final order directing petitioners to cease and desist in advertising their invention or any similar invention as complained of in the complaint (Final Order of cease and desist of respondent R. 18, 19). It is agreed

that the utility of the invention as described in the patent is substantially the same as the description contained in the complaint as a basis for a violation of the Federal Trade Commission Act and that there is no dispute but that the allegations of the complaint read upon the utility of petitioners' patent as described therein (Majority opinion, R. 25; Minority opinion, R. 28, 29).

As provided in the provisions of the Federal Trade Commission Act, petitioners filed a petition for review of the order to cease and desist in the Court below, alleging anew the various defenses and grounds for dismissal of the complaint and proceedings had before the respondent Commission (Petition for Review, R. 20-23). Whereupon, petitioners in the Court below renewed their motion to dismiss the complaint and proceedings (Motion, R. 24). The motion was denied without prejudice to renew it upon final hearing (Majority opinion, R. 25-28). The case came on for final hearing before the Court below. The petitioners' motion to dismiss the complaint and proceedings was renewed together with a final hearing on the entire record. The Court below by a mere majority opinion, the Chief Judge dissenting, denied petitioners' motion to dismiss the complaint and proceedings, and affirmed the order of the respondent, Federal Trade Commission, directing petitioners to cease and desist in advertising the utility of their patented invention Vacudex (Majority opinion, R. 25-28; Order to cease and desist, R. 18, 19; Order of the Court below, R. 35).

Questions Presented

1. Whether in effect as a matter of law, the respondent Federal Trade Commission is vested with power and jurisdiction to review the action and decision of the Commissioner of Patents in granting patents.

2. Whether the Federal Trade Commission as a matter of law, by the provisions of the Federal Trade Commission Act (Sec. 45, Title 15 U. S. C.), is vested with power and jurisdiction to enter an order directing the owners of a patent granted by the United States Patent Office, under the provisions of the patent statutes (Secs. 31, 40, Title 35 U. S. C.), to cease and desist in advertising the utility of the patented invention, the utility as described in the patent, preventing the owners of the patent from advertising the utility of the invention as described therein, and whether or not the Federal Trade Commission Act applies.

3. Whether as a matter of law the Federal Trade Commission by the Federal Trade Commission Act (Sec. 45, Title 15 U. S. C.) is vested with authority and jurisdiction to enter an order involving a patent granted under the provisions of Secs. 31 and 40, Title 35 U. S. C., directing the owners thereof to cease and desist from advertising the utility of the invention described in the patent, which in effect, challenges the utility and thus the validity of the patent.

4. Whether as a matter of law the provisions of the Federal Trade Commission Act (Sec. 45, Title 15 U. S. C.) applies to the patents and patent rights granted under the provision of the patent statutes (Secs. 31 and 40 of Title 35 U. S. C.).

Reasons for Granting the Writ

The decision below was by a mere majority of two Judges, the Chief Judge dissenting (R. 28-34).

The general importance of the decision of the Court below in the enforcement of the Federal Trade Commission Act, Sec. 45, Title 15 U. S. C., and the administration of the patent laws, Art. I, Sec. 8 U. S. Constitution, and the patent statutes, Secs. 31, 40, Title 35 U. S. C., and the exclusive

jurisdictional statute, par. 7, Sec. 41 and par. 5, Sec. 371, Title 28 U. S. C., vesting exclusive jurisdiction in the U. S. District Courts over patents and patent rights, as they relate to and by this proceeding made to conflict with each other, raises important questions which have not been, but should be, settled by this Court. We think the importance of the question here presented is similar to that in *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296, in which this Court granted the writ of certiorari. And similar in importance to the question in *Federal Trade Com.* v. *A. P. W. Poper Co.*, 328 U. S. 193, 198, wherein this Court granted the writ of certiorari because of the importance of the problem in the administration of the Federal Trade Commission Act. Also in this case, in the Court below, Second Circuit, there was a divided vote, one Judge dissenting as in the case at bar. And similar in importance to the question involved in *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 293, in which this Court granted the writ of certiorari.

The majority opinion is in direct, flat and open conflict with the provisions of Article I, Sec. 8, U. S. Constitution, providing that petitioners shall have the exclusive right of their patented invention; with the patent statutes of the United States, Secs. 31, 40, Title 35 U. S. C., granting petitioners the exclusive right to vend their patented invention; with the jurisdictional statute, par. 7, Sec. 41; par. 5, Sec. 371, Title 28 U. S. C., providing that the U. S. District Courts shall have original exclusive jurisdiction to consider and decide all issues arising out of patents and patent rights; and with the provisions of Amendment V, U. S. Constitution, which provides that private property shall not be taken without just compensation.

Conclusion

The questions presented for decision are of first impression and it is believed they have never been before this Court before and should be finally decided and are of gravity and general importance to inventors, patent owners, the public, officials charged with the duty of administering the patent laws, and the application and enforcement of the Federal Trade Commission Act, because if the respondent Federal Trade Commission is vested with power and jurisdiction asserted in this case, it has the power to render patents issued by the Commissioner of Patents impotent and nugatory, as the Chief Judge in the minority opinion states. The majority decision tends to great confusion in the application and administration of the patent laws and the Federal Trade Commission Act. It is, we think, clearly apparent that the problem here presented will constantly recur unless finally settled by a decision of this Court.

WHEREFORE, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

HARRY S. HALL,
434 Munsey Building,
Washington, D. C.
Counsel for Petitioners.

Of Counsel:

J. C. TRIMBLE,
Munsey Building,
Washington, D. C.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The majority opinion and minority opinion are not reported but will be found in the record (Majority opinion, R. 25-28; minority opinion, R. 28-34).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 6, 1949 (R. 35). The time within which to apply for a writ of certiorari was extended by the Chief Justice to October 3, 1949 (R. 36).

Jurisdiction is conferred on this Court by Sec. 45, Title 15 U. S. C.; Sec. 240(a) of the Act of October 13, 1925; and Sec. 347, Title 28 U. S. C., as amended by Sec. 1254, Title 28 U. S. C.

Statement

The essential facts are stated in the preceding petition (pp. 2-5).

Questions Presented

The questions presented are stated in the preceding petition (pp. 5-6).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In effect holding that the respondent Federal Trade Commission is vested with power and jurisdiction to review the action and decision of the Commissioner of Patents in granting a patent.

2. In denying petitioners' motion to reverse the order of the respondent Federal Trade Commission, directing petitioners to cease and desist in advertising the utility of their

patented invention Vacudex, and in failing to dismiss the complaint and proceedings.

3. In failing to hold that petitioners, in advertising the utility of their patented invention Vacudex as described in their patent, are not using unfair methods, and unfair or deceptive acts, or practices in commerce, as defined and required by the Federal Trade Commission Act (Sec. 45, Title 15 U. S. C.) and here sought to be applied and enforced, has no application to the facts of the case at bar, because petitioners in advertising the utility of their patented invention as described in their patent are exercising their exclusive right to do so as provided in the patent laws (Secs. 31, 40, Title 35 U. S. C.).

4. The complaint, proceedings, decision and order of the respondent Federal Trade Commission, in effect, challenges the utility and thus the validity of petitioners' patent, and is also a collateral attack on the patent. In this the respondent Commission lacks power and jurisdiction, for such power and jurisdiction is exclusively vested in the Courts of the United States (Par. 5, Sec. 371, Title 28 U. S. C. and Par. 7, Sec. 41, Title 28 U. S. C.), and then only in a proper proceeding for that purpose.

5. In affirming the decision and order of the respondent Commission in directing petitioners to cease and desist in advertising the utility of their patented invention Vacudex.

Summary of Argument

Certiorari should be granted because of the general importance of the decision of the Court below in its revolutionary and far-reaching effect on patents and patent rights, If the respondent Commission has the power here exercised, every patent issued and to be issued is subject to attack by the Federal Trade Commission. The exclusive Constitu-

tional and statutory right of petitioners to the use and benefit of their invention is denied them.

The decision of the majority in the Court below is in direct, flat and open conflict with the Constitutional patent policy; the patent statutes authorizing and governing patents; and the exclusive original jurisdiction vested in the United States courts to consider and determine patent rights.

It is, therefore, of great general importance that the Federal Trade Commission Act be construed, as it relates to the Constitutional patent policy; the patent statutes; the jurisdictional statutes vesting original exclusive jurisdiction in the United States District Court to consider and determine patents and patent rights; the power of the respondent Commission be defined; and that the questions presented be finally settled by this Court.

ARGUMENT

I

Certiorari Should Be Granted

As heretofore stated, the decision below was by a mere majority of two Judges (R. 25), the Chief Judge dissenting (R. 28).

Petitioners think the foregoing is sufficient ground justifying the granting of the writ of certiorari. Under a similar situation this Court has granted the writ (See reasons for granting the writ, pp. 6-7).

The decision of the Court below is of great general importance in the field of patents and invention with reference to the enforcement of the Federal Trade Commission Act as it relates to and appears to be in conflict with the Constitutional provisions pertaining to patents, Art. I, Sec. 8, U. S. Constitution, which provide that petitioners shall

have the exclusive right to their patented invention; and to the patent statutes, Secs. 31, 40, Title 35 U. S. C., which grant petitioners for a period of seventeen years the exclusive right to vend their invention. It is clear that petitioners' exclusive right to vend the invention is denied them if the Federal Trade Commission has the power here asserted, in effect to prevent them from offering the invention to the public, the first necessary step in vending it, by describing the invention's utility in the advertising which is based on the description of the utility in the patent.

It is conceded that petitioners' advertising substantially describes the utility of the invention as set forth in the patent (Majority opinion, R. 25; dissenting opinion, R. 28). The complaint charges that the advertising of the utility of the invention is false. If it is false, the patented invention lacks utility and thus the patent is rendered invalid. The charges of the complaint, therefore, raise the issue as to the lack of utility in the patented invention and therefore in effect challenges the validity of petitioners' patent, over which respondent Federal Trade Commission lacks power and jurisdiction, and only the United States District Courts are vested with original exclusive jurisdiction to consider and decide such an issue (Par. 7, Sec. 41, Title 28 U. S. C. See also Par. 5, Sec. 371, Title 28 U. S. C.). And then only in a proper proceeding for that purpose. *McCormick Harvesting Machine Co.* v. *Aultum*, 169 U. S. 606, 608-610; *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 364. Such power and jurisdiction does not reside in any officer of the Government, or in the United States Patent Office, and impeachment of a patent cannot be had in a collateral proceeding (as in the case at bar). Only the United States can maintain and prosecute a suit for the cancellation of a patent, and only in a proceeding for that purpose, and then only on the ground of fraud in obtaining it.

Briggs Shoe Machine Co. v. *United States,* 239 U. S. 48, 50; *United States* v. *American Bell Telephone Co.,* 159 U. S. 548, 555; *United States* v. *American Bell Telephone Co.,* 128 U. S. 315, 364; and *Mowrey* v. *Whitney,* 14 Wall. (U. S.) 434, 439-441. For further argument on this point, see reasons for granting the writ, pp. 6-7.

Conclusion

WHEREFORE, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

HARRY S. HALL,
434 Munsey Building,
Washington, D. C.,
Counsel for Petitioners.

Of Counsel:

J. C. TRIMBLE,
Munsey Building,
Washington, D. C.